

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

Case No. CIV-15-324-C

SOUTHEASTERN OKLAHOMA STATE
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM
OF OKLAHOMA,

Defendants.

**REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA’S REPLY
REGARDING ITS MOTION TO COMPEL DISCOVERY RESPONSES**

Defendant Regional University System of Oklahoma (hereinafter “RUSO”), by and through its attorneys of record and pursuant to LCvR7.1(i) submits this limited Reply to Plaintiff’s Response in Objection to RUSO’s Motion to Compel Discovery Responses. [Doc.75]. In further support of the Motion, RUSO shows the Court as follows.

INTRAGOVERNMENTAL COMMUNICATION DOCUMENTS

Without further elaboration, Plaintiff has affirmatively withdrawn its assertions of privilege regarding e-mail correspondence between the Department of Justice (“DOJ”) and the Department of Education (“DOE”), as well as the privileges asserted regarding certain other documents. (*See* fn. 4, at p. 4, of [Doc. 75]). Plaintiff states that those documents will be produced, but does not state when. Implicit in this withdrawal appears

to be Plaintiff's acknowledgment that the original assertion of privilege was misplaced regarding DOJ communications with this non-party governmental entity. However the same should be true of DOJ's communications with the Equal Employment Opportunity Commission ("EEOC"). As Plaintiff affirmatively states in its Response brief, ". . . the EEOC is not a party to this case." [Doc. 75, p. 13]. Plaintiff goes on to contend that the Defendants have "stipulated that intra-agency communications within the Department of Justice are privilege." *Id.* However, Defendants have not stipulated that communications between the DOJ and the EEOC are privileged,¹ (absent the presence of ongoing litigation, or an anticipation of actual litigation directly due to a determination that the EEOC's conciliation process had failed despite a good faith effort on the part of the EEOC). Therefore, those documents created prior to an anticipation of litigation are not privileged and should be produced.

MEDICAL RECORDS OF INTERVENOR TUDOR

This has been an ongoing source of dispute for a great deal of time. Plaintiff cannot honestly argue that this has not been, and is not currently, an area of pointed disagreement under which Defendants have repeatedly asked for records and Plaintiff has repeatedly refused to produce records. To be clear, Plaintiff does not dispute that it in fact possesses documents responsive to this area of Defendants' requests. Instead, Plaintiff merely argues (without citation to any authority) that because Dr. Tudor objects to the

¹To the extent Plaintiff's latest privilege log moves the goal posts once again, the shifting and evolving assertions of privilege may mean that an in camera review of the documents in question is the most efficient (and perhaps only) meaningful way to resolve this dispute.

documents' release Plaintiff may refuse to comply with Defendants' discovery requests. The multiple cases cited under Proposition II of Defendants' Motion stand undisturbed. Accordingly, that portion of the Motion should be deemed confessed. *See* LCvR7.1(g), *below*.

Further, in its Response brief Plaintiff contends that it "agrees with Dr. Tudor's objections but since Dr. Tudor – not the United States – holds any applicable privilege over these records, it would be inappropriate for the United States to make decisions on whether these records should be produced." [Doc. 75, p. 14]. This shockingly candid statement is critical for two reasons. First, Plaintiff knows that it does not hold any privilege with regard to these documents, yet still refuses to produce them. This is inappropriate for the United States to do. Second, Dr. Tudor has not filed an objection to Defendants' Motion to Compel, and is out of time for doing so.

Defendants' Motion to Compel has been on file since June 23, 2016. Under LCvR7.1(g), "**[e]ach party opposing** a motion **shall** file a response within 21 days. . . ." [Emphasis added]. Otherwise, the motion may be "deemed confessed." Dr. Tudor was a party at the time Defendants' Motion to Compel was filed, and more than 21 days have passed since that filing. Dr. Tudor confessed Defendants' Motion through total non-response. Plaintiff confessed this portion of the Motion in particular due to the failure to controvert any of the authority cited by Defendants' Motion. Therefore, the Motion should be granted as to items sought under Proposition II.

FACTUAL EVIDENCE SOUGHT BY DEFENDANTS' REQUESTS

Regarding the particular Interrogatories and Requests for Production set forth in Defendants' Motion at pages 16-21, the requests and responses largely speak for themselves. However, a few items in Plaintiff's Response brief warrant further discussion. It bears noting that if one purpose of Discovery is to make sure that all parties (and the Court) have equal access to the facts relevant to the case's claims and defenses then Plaintiff's conduct is frustrating that purpose. In addition to standing on the arguments made about each listed Interrogatory in the Motion to Compel, Defendants offer the following comments in reply to Plaintiff's responses regarding these Interrogatories in particular:

Interrogatory No. 6: Plaintiff does not dispute that its counsel stated during the Rule 37 conference that there were other instances. However, only now, after Defendants' Motion does Plaintiff state that it has "provided all responsive information."

Interrogatory No. 8: To the extent Plaintiff is relying on an expert's opinion to answer this Interrogatory, Plaintiff should amend and update its answer to this written request. It has not yet done so.

Interrogatories Nos. 11 and 12: Plaintiff need not provide a "narrative," but a simple bullet-point list of the specific violations alleged to have happened should be both readily knowable by Plaintiff, and easily provided.

Interrogatories Nos. 16 and 17; Request for Production No. 15: Given that Defendants' documents are all largely public records, Plaintiff has had access to all of the Defendants' policies and training manuals since prior to Intervenor's September 2010

Charge of Discrimination. Plaintiff made an affirmative demand in its Complaint for implementation of new policies, practices, etc. and should be required to tell Defendants what those demanded measures are.

Request for Production No. 5: Plaintiff's response ignores the fact that **facts** are not privileged. If Plaintiff possesses records showing factual information regarding Intervenor then those records should be produced, if only in a redacted format. Additionally, Intervenor was very uncooperative during her deposition, and refused to answer a number of basic background type of questions. If this factual information is already held by Plaintiff it should be produced.

CONCLUSION

As the Oklahoma Supreme Court put it, “[t]he purpose of modern discovery practice and procedure is to promote the discovery of the true facts and circumstances of the controversy, rather than to aid in their concealment.” *Boswell v. Schultz*, 2007 OK 94, ¶ 14, 175 P.3d 390, 395. *Cf. Basaldu v. Goodrich Corp.*, 2009 WL 1160915, *2 (E.D.Tenn.2009) (“The **purpose** of the modern civil **discovery** rules is to get all of the proverbial cards on the table in advance of trial.”); *Bear, Stearns Funding, Inc. v. Interface Group–Nevada, Inc.*, 2007 WL 4051179, *2 (S.D.N.Y.2007) (“By requiring disclosure of all relevant information, the **discovery** rules allow ultimate resolution of disputed facts to be based *on full and accurate understanding* of true facts.”) (emphasis in original). Plaintiff's ongoing obfuscation and refusal to put all of the proverbial cards on the table is in direct contravention of the purpose of Discovery in a civil case. Defendants' Motion to Compel should be granted.

Respectfully submitted,

/s/ Jeb E. Joseph

DIXIE L. COFFEY, OBA #11876

JEB E. JOSEPH, OBA #19137

KINDANNE JONES, OBA #11374

Assistant Attorneys General Oklahoma

Attorney General's Office

Litigation Division

313 NE 21st Street

Oklahoma City, OK 73105

Telephone: 405.521.3921

Facsimile: 405.521.4518

Attorneys for Defendants Southeastern

Oklahoma State University and The Regional

University System of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2016, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Allan Townsend
Delora Kennebrew
Meredith Burrell
US DEPT. OF JUSTICE CIVIL RIGHTS DIVISION-DC
950 Pennsylvania Avenue NW Rm 49258 PHB
Washington, DC 20530
Email: allan.townsend@usdoj.gov
delora.kennebrew@usdoj.gov
meredith.burrell@usdoj.gov
Attorneys for United States of America

Brittany Novotny
NATIONAL LITIGATION LAW GROUP, PLLC
42 Shepherd Center
2401 NW 23rd Street
Oklahoma City, OK 73107
Email: bnovotny@nationlit.com
Attorney for Intervenor Plaintiff

Jillian Weiss
Ezra Young
LAW OFFICE OF JILLIAN T. WEISS, P.C.
PO Box 642
Tuxedo Park, NY 10987
Email: jtweiss@jtweisslaw.com
Email: eyoung@jtweisslaw.com
Attorney for Intervenor Plaintiff

/s/Jeb E. Joseph
Jeb E. Joseph